Office - Supreme Court, U. S.
FILED
FEB 17 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 746

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

CHARLES J. MONAHAN,
77 West Washington Street,
Chicago, Illinois,
HENRY I. GREEN,
Urbana, Illinois,
Attorneys for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for Writ of Certiorari	1
I. Summary and Short Statement of the Matter Involved	1
II. Basis Upon Which Petitioner Contends This Court Has Jurisdiction	4
III. Question Presented	4
IV. Reasons Relied On for Allowance of the Writ	5
Brief in Support of Petition for Writ of Certiorari	9
I. Opinion of the Court Below	9
II. Jurisdiction of This Court	9
III. Statement of the Case	9
IV. Specification of Errors	10
V. Argument	11

Cases Cited.

Carpenter v. Shepherd (Texas), 145 S. W. (2d) 562... 18

McCoy v. Board of Supervisors of Los Angeles County (California), 114 Pac. Rep. (2d) 569..... 18

State v. Grayston (Missouri), 163 S. W. (2d) 335..... 18

State of Louisiana v. Joseph (Louisiana), 78 So. 663.. 18

Statutes.

Article I, Section 8, Federal Constitution..... 12

Article II, Section 2, Federal Constitution..... 13

Article IV, Section 4, Federal Constitution..... 13

Article VI, Par. 2, Constitution of the United States.. 12

Chapter 1, Section 2, Title 10 U. S. C. A.—Army—as amended December 13, 1941, pocket supplement U. S. C. A., page 3..... 17

Decisions in Direct Conflict With the Decision of the Illinois Supreme Court in This Case..... 18

In re Advisory Opinion to the Governor, Supreme Court of Florida, en Banc, 8 So. Rep. (2d) 26..... 18

Later Advisory Opinion to the Governor by the Supreme Court of Florida, 9 So. Rep. (2d) 172..... 18

Section 235, Judicial Code, Section 343, Title 28 U. S. C. A., par. b..... 4

"The Selective Training and Service Act of 1940" U. S. C. A. Title 50—War, Cumulative Annual Pocket Part 1941, page 88, Section 308..... 14

"Service Mens Employment Tenure Act" (Ill. Rev. Stat. State Bar Ass'n. Ed. 1941, Page 3022, Secs. 29 to 35 of Chap. 126½) entitled "Soldiers and Sailors"; 1941 Sessions Laws. Vol. 1, page 1202..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable Supreme Court of the United States, and To the Honorable Harlan F. Stone, Chief Justice:

I.

Summary and Short Statement of the Matter Involved.

This is an action in mandamus which was begun in the Circuit Court of Cook County, Illinois, by a complaint filed in the name of the People of the State of Illinois *ex rel.* Earle G. H. Cromer, as plaintiff. The petition was filed

by Cromer as an elector resident and taxpayer in the Village of Maywood, Cook County, Illinois, for a writ of mandamus to compel the defendants therein named, who were the corporate officers of the Village of Maywood, to call an election to fill an alleged vacancy in the office of Police Magistrate. This petitioner, Edward D. Markham, was by order of said Circuit Court made an additional defendant in said cause which proceeded to final judgment awarding the writ of mandamus as prayed in the complaint. Edward D. Markham, by his attorney, and all of the other defendants, by their attorney, filed motions to strike the complaint, which motions were overruled; the defendants elected to stand by the motions, and judgment was entered against them accordingly.

Edward D. Markham prosecuted an appeal to the Supreme Court of Illinois which affirmed the judgment in an opinion filed November 17, 1942, which is reported in 381 Ill. page 337.

The basis of the alleged vacancy in the office of Police Magistrate requiring the calling of an election, which was alleged in the complaint filed by Cromer, was that after petitioner had been elected to the office of Police Magistrate and qualified, and while holding said office, he "accepted an office of honor and profit under the United States viz.: Captain in the United States Army" and "that the acceptance of said office under the United States *ipso facto* constituted a resignation and disqualification to continue in said office of Police Magistrate under the Constitution of Illinois, so that said office of Police Magistrate became vacant and continues to be vacant".

The single question involved under the pleadings was and is whether or not the acceptance of a commission in time of national emergency in any branch of the United States Army (other than the Regular Army) operates automatically to create a vacancy in any office held under

the authority of the state by the civilian citizen who enters or is inducted into the armed forces of the Federal Government.

There is no allegation in the complaint and it has never been claimed that petitioner holds any commission in the Regular Army of the United States.

The *nisi prius* court held that the acceptance of a commission from the Federal Government in the armed forces operated *ipso facto* to create a vacancy in any office held under the authority of the state by any such civilian citizen.

The Supreme Court of Illinois affirmed the decision of the court below and held "that the induction into military service by one commissioned as a Captain automatically vacates the office to which a person has been previously elected."

This decision by the highest court of the State of Illinois is in direct conflict with the decisions of the highest courts of a number of other states of the United States where the same question was presented and contrary decisions rendered.

There is, therefore, a direct conflict between the decisions of the courts of last resort in several of the other states of the union, and the court of last resort in the State of Illinois, on the same identical question.

The decision of the Illinois Supreme Court is based upon the provisions of Section 3, of Article IV of the Illinois State Constitution, which is as follows:

> "nor shall any person, holding any office of honor or profit under * * * the government of the United States * * * hold any office of honor or profit under the authority of this State."

The above provision is identical with the provisions of the Constitutions of the other states which have held that this constitutional provision has no application to a situation of the character presented by this record and to the

like situations which have arisen and are arising throughout the several states of the Nation.

II.

Basis Upon Which Petitioner Contends This Court Has Jurisdiction.

The jurisdiction of this court to review by certiorari the question involved in the decision by the state court is the provision of Section 235 of the Judicial Code, being Section 343 of Title 28 U. S. C. A.; and especially paragraph b thereof which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

III.

Question Presented.

The single question presented by this petition is:

1. Whether a civilian holding public office under the authority of a state, *ipso facto* creates a vacancy in that office if he accepts a commission in the armed forces of the United States; or

2. Whether or not under the emergency which the Congress of the United States has decided justified and produced the passage of necessary legislation to raise additional armed forces, and upon which it acted in enacting

the various Federal laws, including the Soldiers' and Sailors' Civil Relief Act and the Selective Service Act, and pursuant to which great numbers of citizens have been inducted into the United States Army, and commissions have been conferred upon individual inductees, furnishes any basis for the states to penalize the civilian citizen accepting such a commission by depriving him of the title to any elective office held by him under the authority of the state; or

3. Whether or not any of the states can deprive any such citizen of the title, right, privilege or immunity he theretofore possessed as the holder of an office under the authority of the state, and deny to him the right, privilege and immunity against such office being declared vacant for that reason; or

4. Whether or not the acceptance of a commission in time of war emergency in the armed forces created or enlarged under the authority of the Constitution and laws of the United States, by a civilian holding office under the authority of a state, amounts to the holding of an office of honor or profit under the Federal Government and thereby creates a vacancy in the state office.

IV.

Reasons Relied On for Allowance of the Writ.

1. The Constitution of the United States granting to the Congress the power to declare war, raise armies, etc. and the Selective Service Act and other supporting statutes passed pursuant to that constitutional authority, is the supreme law of the land; and it will control against any state law, either constitutional or legislative;

2. Any provision of the Constitution of Illinois to be valid must be construed as consistent and in harmony with the provisions of the supreme law of the land;

3. The decision in this case by the Supreme Court of Illinois conflicts with the decisions of the courts of last resort in a number of other states in the union which have held that the provisions of the State Constitution, common to these states, against at the same time holding offices of honor or profit under both the Federal Government and the State Government, should not and will not be construed to apply to a case where the Federal office held is that of a commission in the armed forces in time of war and not in the Regular Army of the United States.

4. The Chief Justice of the Supreme Court of Illinois has formally certified that the decision of that court in this case presents and involves a federal question. We insert herein a copy of that certificate, the original of which appears in the record filed in this cause immediately preceding page numbered 1, as follows:

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

People of the State of Illinois, *ex rel.*, Earle G. H. Cromer, *Appellee*,

vs.

The Village of Maywood, *et al.*, and Edward D. Markham, *Appellant*.

The record in this cause and the decision of the Supreme Court of Illinois, as set forth in the opinion filed herein, presents and involves a Federal question, to-wit: whether or not the Constitution of the United States and the Acts of Congress passed pursuant thereto in the raising of an army in time of war, or the provisions of Section 3 of Article IV of the Constitution of the State of Illinois, is controlling in determining the civilian status of the appellant when he received a commission as Captain in the armed forces of the United States.

The Federal question presented and involved in the complaint filed in the *nisi prius* court in this case and the opinion of the Supreme Court of Illinois filed herein, shows that the question was presented and involved as to whether or not the acceptance or holding by appellant of a commission as Captain in the armed forces of the United States operated to render vacant appellant's office of Police Magistrate in the Village of Maywood, Illinois under the provisions of Section 3 of Article IV of the Constitution of the State of Illinois which provides:

> "Nor shall any person holding any office of honor or profit under any foreign government or under the government of the United States hold any office of honor or profit under the authority of this State."

and whether or not the said provision of the Constitution of the State of Illinois is in conflict with the Constitution and Laws of the United States relating to the induction of civilians into the armed forces of the United States in the state of war existing at the time said commission was granted and accepted.

And the undersigned presiding Justice of the Supreme Court certifies accordingly.

CLYDE E. STONE,
Presiding Justice of the Supreme Court of the State of Illinois.

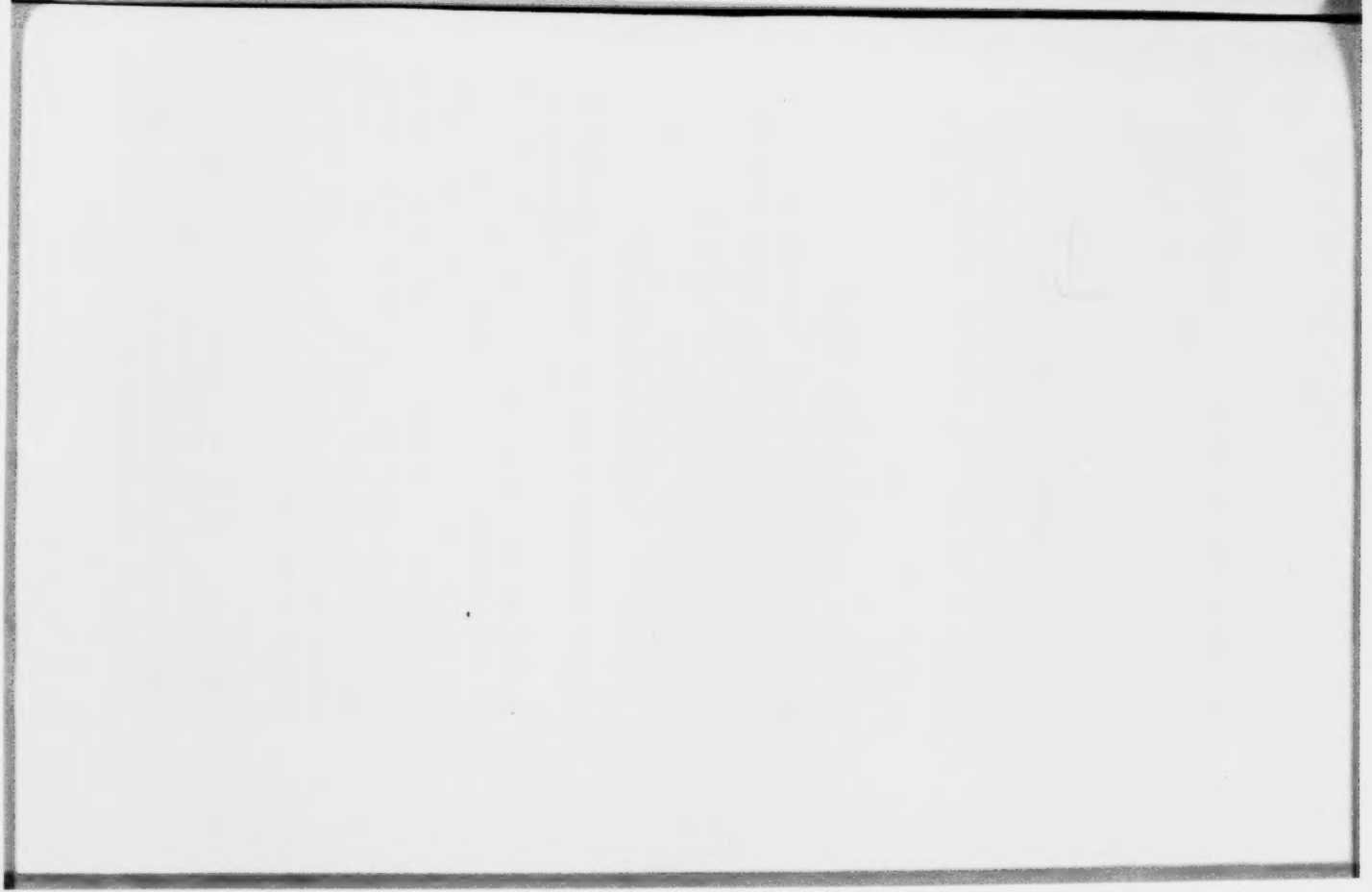
WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Supreme Court of the State of Illinois, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Illinois had in the case numbered and entitled on its docket, No. 26765, The People, *ex rel.*, Earle G. H. Cromer, Appellee, *vs.* The Village of Maywood, *et al.* (Edward D. Markham, Appellant), to the end that this cause may be reviewed and determined by this court as provided by the

statutes of the United States, and that the judgment and decree herein of the said Supreme Court of Illinois may be reversed by this court, and for such other and further relief as to this court may seem proper.

Respectfully submitted,

CHARLES J. MONAHAN,
77 West Washington Street,
Chicago, Illinois,

HENRY I. GREEN,
Urbana, Illinois,
Attorneys for Petitioner.



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

A written opinion of the Supreme Court of Illinois (Rec. 9-13) was rendered November 17, 1942, and is reported in 381 Ill. 337.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of the Court are stated in the foregoing petition for writ of certiorari.

III.

Statement of the Case.

The foregoing petition for writ of certiorari contains a general statement of the case.

The question presented arises wholly on the face of the pleadings. The complaint makes no allegation that the petitioner was in the Regular Army or had accepted any commission in the Regular Army of the United States. After the date of the passage by the Congress of the Selective Service Act and the Soldiers and Sailors Civil Relief Act of 1940, and other acts of Congress to raise and support additional armed forces were adopted, petitioner received his commission, late in the year 1941.

The litigation in the Circuit Court of Cook County was concluded by the final judgment in that Court February 19, 1942. This was after the declarations of war had been voted by the Congress of the United States. The decision

of the Supreme Court of Illinois was on November 17, 1942.

The motions to strike the complaint while admitting the averments of the complaint that petitioner had accepted a commission as Captain in the United States Army, did not admit the allegation that petitioner had ceased to be a resident of Maywood, Illinois, but paragraph 5 of petitioner's motion to strike the complaint or petition for mandamus, appearing at page 6 of the abstract of record filed in the Supreme Court, states that (Rec. 3):

> "Defendant, (petitioner) by this motion to strike does not admit the allegations in (pars.) 6 and 7 of the petition alleging that this (petitioner) has ceased to be a resident of Maywood and reserves the right to raise an issue in respect thereto".

The order of the Circuit Court of Cook County overruling the motion to strike the petition for mandamus was entered February 4, 1942, (page 7, Abstract of Record in Supreme Court) (Rec. 3); petitioner having elected to stand by his motion to strike the petition for mandamus, the Circuit Court entered its final judgment granting the writ of mandamus on February 19, 1942.

It therefore, is an admitted fact that judgment declaring petitioner's office as Police Magistrate of the Village of Maywood vacant, was entered after the historical assault on Pearl Harbor, and the United States was engaged in a war of unprecedented magnitude and at a time when the future existence of the United States of America was at stake.

IV.

Specification of Errors.

1. The Supreme Court of Illinois erred in holding that where a civilian holds an office under the authority of the state, his office becomes *ipso facto* vacant upon and because

of his acceptance of a commission in the United States Army (other than the Regular Army).

2. The Supreme Court of Illinois erred in holding that when petitioner accepted a commission in the armed forces of the United States, he thereby automatically vacated his office as Police Magistrate in the Village of Maywood, Illinois.

3. The Supreme Court of Illinois erred in holding that the acceptance of a commission in the armed forces of the United States is the acceptance of an office of honor or profit under the Federal Government within the meaning and application of Section 3, Article IV of the Illinois State Constitution.

4. The Supreme Court of Illinois erred in affirming the judgment of the Circuit Court of Cook County, in this case.

5. The Supreme Court of Illinois erred in failing to reverse the judgment entered by the Circuit Court of Cook County in this case.

V.

Argument.

It is apparent from the bare statement of the question involved in this case, that the Supreme Court of Illinois has by the construction it has placed on the provision of Section 3, Article IV of the State Constitution, considered it paramount to the provisions of the Constitution of the United States and Acts of Congress passed pursuant thereto; and has ignored the plain provision of the Federal Constitution and Federal Statutes as the supreme law of the land.

The preamble to the Constitution of the United States recites that it is ordained and adopted to, among other things,

> "provide for the common defense" and "promote the general welfare".

Article VI, Paragraph 2 of the Constitution of the United States provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is, therefore, obvious that the supreme law of the land cannot be impaired by any state, whether such impairment is found in the State Constitution or in the Acts of the State Legislature. It adds nothing to the power of the state to assert its right under a provision in its Constitution rather than an Act of its state legislature. Unless a provision in a state constitution can be construed to be in harmony with the supreme law of the land, it is not valid.

Article I, Section 8 of the Federal Constitution provides that:

> "The Congress shall have power
> to provide for the common defense and general welfare of the United States;
> to declare war;
> to raise and support armies;
> to provide and maintain a navy;
> to make rules for the Government and regulation of the land and naval forces;
> to provide for calling forth the militia to * * * suppress insurrections and repel invasions;
> to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be in the service of the United States;
> make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Article II, Section 2 of the Federal Constitution provides that:

> "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States."

By the first section of Article II of the Federal Constitution it is provided:

> "The executive power shall be vested in a president of the United States of America."

By Article IV, Section 4 of the Federal Constitution it is provided:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion."

There is, therefore, no want of power or authority in the President and the Congress of the United States to take every action and do everything, in their judgment deemed necessary, appropriate or expedient to protect, further and carry out the objects and purposes expressed in the Federal Constitution. And it will certainly not be disputed that in the exercise of these powers and functions the National Government will protect the individual citizen in his guaranteed rights, privileges and immunities. It will protect him in his title to an office under state authority just the same as it will protect him in his title to property under like authority; in fact, his office is a property right.

It must also be admitted that the Federal Government will not, under its constitutional powers, permit any state of the Union to weaken, or impair, or strike down, or interfere with the nation's supreme right, power and authority to raise an army and prosecute a war.

Before this case was decided in the Circuit Court of Cook County, Illinois the Congress of the United States

had passed many statutes in aid of the prosecution of the war it had declared against foreign nations. Among them was the Act commonly known as the "Conscription Act" or the "Draft Law" and more particularly defined as

> "The Selective Training and Service Act of 1940" U. S. C. A. Title 50—War, Cumulative Annual Pocket Part 1941, page 88, Section 308,

which was adopted by the 76th Congress and approved by the President on September 16, 1940, and is entitled

> "An Act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training."

And by paragraph (b) of Section 8 (308) it is provided:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within forty days after he is relieved from such training and service,—
>
> "(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;
>
> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> "(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

It will be noted that by subparagraph (C) of paragraph (b) of said Section 8, in as respectful language as could

be employed to still express its positive conviction that if a civilian was in the employ of any state or political subdivision thereof "it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay" at the end of his term of service in the armed forces.

It is also to be remarked that the legislative branch of the state government of the State of Illinois, following the adoption of the Selective Training and Service Act of 1940, and by other war measures, approved and announced it to be the public policy of the state to approve the action of the Federal Government. On July 17, 1941 an act of the General Assembly of the State of Illinois was approved, known and called by the short title "Service Mens Employment Tenure Act (Ill. Rev. Stat. State Bar Ass'n. Ed. 1941, Page 3022, Secs. 29 to 35 of Chap. 126½) entitled "Soldiers and Sailors"; 1941 Session Laws. Vol. 1, page 1202. By Section 2 of this Act the Legislature of Illinois declared the public policy of the State as a guide to the acts, interpretation and application, and states:

> "As a constituent commonwealth of the United States of America, the State of Illinois is dedicated to the urgent task of strengthening and expediting the national defense under the emergent conditions which are threatening the peace and security of this nation. It is the considered judgment of the General Assembly that the wage earners of Illinois who respond to their country's call to service in this time of crisis, are deserving of every protection of their employment status which the law may afford, and that repetition of the regrettable experience existing after the great war of 1917-1918, wherein returning service men were subjected to serious discrimination with regard to tenure and other rights of employment, must be avoided, since any form of economic discrimination against returning service men is a serious menace to the entire social

fabric of the United States of America and the State of Illinois.

"By safeguarding the employment and the rights and privileges inhering in the employment contract, of service men, the State of Illinois encourages its workers to participate to the fullest extent in the national defense program and thereby heightens the contribution of our State to the protection of our heritage of liberty and democracy."

Then in the next section the Illinois Legislature defined "persons in the military service" as follows:

"The term 'persons in the military service', as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard and all members of the State Militia called into the service or training of the United States of America. The term 'military service', as used in this Act, shall signify Federal service or active duty with any branch of service heretofore referred to as well as training or education under the supervision of the United States preliminary to induction into the military service.

"The foregoing definitions shall apply both to voluntary enlistment and to induction into service by draft or conscription."

And in Section 5 of the Act provided:

"Any person who is restored or seeks to be restored to a position in accordance with the provisions of this Act, shall be considered as having been on furlough or leave of absence during his military service, and shall be so restored without loss of seniority."

It will be noted that the Illinois Legislature recognized the regrettable experience existing after the great war of 1917-1918, wherein "returning service men were subjected to serious discrimination with regard to tenure and other rights of employment," and stated that the same must be avoided in the present national calamity and gave its reasons. It will also be noted that "tenure" was one of the rights which the legislature expressed its desire to protect.

It is also apparent that the legislature was making no reference to members of the Regular Army but was referring to those that might be included in the United States Army, Navy or other armed forces.

The Congress has always recognized the difference between the "Regular Army," and the "United States Army" or the "Army of the United States." It is provided by Chapter 1, Section 2, Title 10 U. S. C. A.—Army—as amended December 13, 1941, appearing in the pocket supplement of the U. S. C. A., page 3, that

> "The Army of the United States shall consist of the Regular Army,
> the National Guard of the United States,
> the National Guard while in the service of the United States,
> the officers reserve corps,
> the organized reserves, and
> the enlisted reserve corps,
> and shall include persons inducted into the land forces of the United States under Sections 301, 318 of Appendix to Title 50."

The United States Army, therefore, consists of the Regular Army and all of these other forces created and organized as a part of the armies of the United States. Like provisions were made for the creation and maintenance of the United States Navy.

There is in this case, therefore, no question of whether or not a member of the Regular Army could at the same time hold civilian office under the authority of a state. There is no allegation or claim that petitioner is a member of the Regular Army.

There are a multitude of other acts of Congress, regulations and proclamations recognizing the same distinction and dealing with the enlargement of the armed forces to meet the unprecedented existing national emergency; but the foregoing are illustrative and sufficiently definite to

establish the distinction between the Regular Army and the other armed forces of the nation.

Decisions in Direct Conflict With the Decision of the Illinois Supreme Court in This Case.

At the time this case was decided in the Supreme Court of Illinois there were numerous decisions by the courts of other states which, if followed and applied, would have compelled the court to hold that the complaint or petition for mandamus filed in this case was insufficient and should have been dismissed.

Among the decisions holding the contrary view of that expressed by the Supreme Court of Illinois in this case are

State v. *Grayston* (Missouri), 163 S. W. (2d) 335;

McCoy v. *Board of Supervisors of Los Angeles County* (California), 114 Pac. Rep. (2d) 569;

State of Louisiana v. *Joseph* (Louisiana), 78 So. 663;

Carpenter v. *Shepherd* (Texas), 145 S. W. (2d) 562;

In re Advisory Opinion to the Governor, Supreme Court of Florida, en Banc, 8 So. Rep. (2d) 26;

Later Advisory Opinion to the Governor by the Supreme Court of Florida, 9 So. Rep. (2d) 172.

In each of the above cited cases, the court of last resort in the state of residence of the citizen involved, held exactly contrary to the decision of the Illinois Supreme Court in this case. In each of them, a person holding an office of honor or profit under the authority of the State Government, accepted a commission as an officer in the Army of the United States. There was the same provision in the state constitution that appears in the Illinois constitution, prohibiting any person from holding office of honor or profit under the authority of the state, and at the same time

holding an office of honor or profit under the Federal Government.

In each of the cases cited, the court of last resort held a commission in the Armed Forces of the United States was not an office of honor or profit within the meaning of the state constitution using that phrase.

We respectfully submit that a definition of the rank of a member of the Armed Forces of the nation does not imply an office of honor or profit under the Federal Government, as the term, "honor or profit," is used to prohibit the holding of incompatible offices by the same person.

The underlying reason for the provision in the constitutions of the several states is to prohibit the holding by one person of two offices which are incompatible. In all of the states, exceptions appear where the legislatures have definitely provided that the holding of certain offices is not incompatible with the holding of another office. Even the Illinois constitution permits a Justice of the Peace to be a member of the General Assembly, in the same section that the Supreme Court of Illinois relies upon for its decision in this case. The Illinois constitution expressly excepts the office of Justice of the Peace as one incompatible with that of a member of the General Assembly.

By the Illinois law, a Police Magistrate has the same powers, and exercises the same functions, and is in all respects the same character of officer, as a Justice of the Peace, the only difference being that the one is a city elective office and the other is a town (township) elective office; the same jurisdiction is given to Police Magistrates as to Justices of the Peace; there is no difference in the office of Police Magistrate and Justice of the Peace in Illinois except the territory in which the officer is elected.

It is an unwarranted extension of the definition of the term "honor or profit" to say that it applies to a commission in the Army of the United States.

It cannot be claimed that there is anything incompatible with the discharge of the duties of a captain in the United States Army and the discharge of the duties of a Police Magistrate in civil life. Of course, as held by the courts of other states, in the decisions above cited, there is a leave of absence during the time the person holding an office under authority of the state is actually engaged in his duties as a commissioned officer in the Armed Forces; but that does not mean that his office *ipso facto* becomes vacant; and that he automatically resigned from the office by accepting a commission in the Army.

The record in this case also shows that an attempt was made to get the Supreme Court of Illinois to review the decision in this case and abundant opportunity afforded to that end. The record shows (page 19) that the rules of the Illinois Supreme Court allow a petition for rehearing to be filed within twenty-five days from the date of the opinion; and that notice of intention to file it shall be given within fifteen days after the opinion was filed.

On page 17 of the record it appears, by a communication from the Clerk of the Supreme Court, that the necessary number of copies of a petition for rehearing, with proof of service, were received on December 11, 1942, which was twenty-four days after the date the opinion had been filed; but that they were returned because the notice of intention to file them had not been given within fifteen days.

At page 18 of the record appears the letter written by the attorney for petitioner, enclosing a motion for leave to file the petition for rehearing instanter, and reciting that the necessary copies had been deposited with the Clerk within the twenty-five day period.

It further appears at page 20, *et seq.* of the record, that affidavit was filed in support of the request to file the peti-

tion for rehearing instanter, together with a copy of the petitions which had been deposited with the Clerk, and the presentation of this motion to the Court.

Also, at page 29, *et seq.*, there appears a motion filed by the President of the Illinois State's Attorneys Association, asking leave to file petition for rehearing, and brief and argument in support thereof, *amicus curiae*.

Then, on pages 33 and 34 of the record, appear the orders of Illinois Supreme Court denying the request and motion of petitioner's counsel and of the President of the Illinois State's Attorneys Association to file petition for rehearing and be heard in support thereof.

Under the language of the opinion of the Illinois Supreme Court as to the questions which had been presented and argued on the appeal, it is obvious that the Court denied the opportunity for petitioner's counsel or the President of the Illinois State's Attorneys Association, to acquaint the Court with the contrary holdings of the courts of last resort of other states on the question involved in this petition for *certiorari*.

It is, therefore, apparent that the Supreme Court of Illinois has never given due consideration to the question here presented.

We further respectfully submit that no decision in any court at any previous period in American history is a precedent on the question involved in this case under existing national and international conditions.

The present emergency is unprecedented in American history; the safety, security and preservation of the National Government is jeopardized and is at stake in the present World War. All courts will take judicial notice of the fact that this nation is engaged in a struggle for its life and future existence. It is not a time for the citizen

to exercise a choice, or entertain an ambition to be a soldier. His freedom of action is the same whether he be the lowest private in the ranks or a General in command of the Armies. There may be some difference if he has chosen the life of a soldier as a profession by becoming a member of the Regular Army. That distinction is recognized by the Congress and by all decisions of the courts on the subject. A member of the Regular Army, whether an officer or a private, is engaged in a profession, as has been repeatedly held wherever the question was involved. But that question is not involved here, because there is no claim that petitioner is a member of the Regular Army.

The ultimate question involved in this case is whether or not a citizen shall be penalized because he is a patriot.

If the common prayer for an early peace is realized, civil offices held by members of the Armed Forces, where the term for which they were elected has not expired, should be open, not vacant, for them to resume and enjoy the title, right and privilege of filling out their term of office to which they were elected, which may remain after their honorable discharge from the Army of the United States.

The decision of the Illinois Supreme Court in this case deny him that title, right and privilege.

During the time the civilian serves his country as a soldier, he should have immunity against the loss of his job or his office in civilian life, whether in private employment or to which he had been chosen by the electors of his residence.

The sacrifice which the citizen makes in responding to his country's call in the existing unprecedented emergency should not include the forfeiture of his civil rights, which he had when he entered upon his service as a soldier.

We respectfully submit that the decisions of the courts of last resort of the sister states of Missouri and California

and Louisiana and Texas and Florida are correct; and that the decision of the Supreme Court of Illinois in this case is erroneous and should be reversed.

Respectfully submitted,

CHARLES J. MONAHAN,
77 West Washington Street,
Chicago, Illinois,

HENRY I. GREEN,
Urbana, Illinois,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718 746

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

GEORGE W. HOWARD, JR., *President,*
S. J. HOLDERMAN, *Secretary-Treasurer,*
LYLE WHEELER, *First Vice President,*
LEE E. DANIELS, *Second Vice President,*
WILLIAM M. CARROLL, *Third Vice President,*
Illinois State's Attorney's Association,
JOHN J. BRESEE,
HAROLD C. JONES,
WILLIAM T. HENDERSON,
Special State's Attorney's Association Committee,
THOMAS SWEENEY,
Member of Association Representing the Above.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. .....

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorable Supreme Court of the United States and to the Honorable Harlan F. Stone, Chief Justice:

I.

George W. Howard, Jr., President, S. J. Holderman, Secretary-Treasurer, Lyle Wheeler, First Vice President, Lee E. Daniels, Second Vice President, and William M.

Carroll, Third Vice President, officers of the Illinois State's Attorney's Association and John J. Bresee, Harold C. Jones, William T. Henderson, special committee appointed by said Association, all by Thomas Sweeney, member of said Association representing the above, move this Honorable Court for leave to appear *amicus curiae* in support of the petition for *certiorari* filed in this cause by Edward D. Markham and respectfully show:

1. This Association consists of the State's Attorneys of the various Counties of the State of Illinois. During the past year at least eight of its members, representing eight different Counties of the State of Illinois, have been inducted into the Army of the United States. The question presented therefore, by the petition relates directly to the title, right, privilege or immunity possessed by those elected State's Attorneys and a decision upon the question will act, not only upon the title of those who have already been so inducted, but also upon those members of this Association who in the future may be so inducted.

2. The State's Attorneys of the various Counties comprising this Association are charged by operation of the laws of the State of Illinois with the duty of attending upon Grand Juries, preparing indictments, prosecuting cases, advising County Officials, defending any actions or proceedings brought against the County or any County or State officer in his official capacity within his County and appears on behalf of the County in all matters to which it is a party or in which it or the People of the State is interested.

The question presented therefore, by the petitioner is involved with respect to situations of other elected officials of the State of Illinois wherein the same question as to the tenure of citizens elected who may be inducted into the armed forces of the United States is involved.

3. In the various Counties in the State of Illinois where the State's Attorney of the respective County, has been inducted into the armed forces, the Board of Supervisors of said County has by appropriate reso-

lution granted to the elected State's Attorney or other county officials involved, a formal leave of absence during the term of his service in the armed forces and by like resolution have provided for the discharge of the duties of the office by an assistant or assistants appointed by such elective official and approved by the Board of Supervisors of such County.

4. That by reason of the decision of the Supreme Court of the State of Illinois of this case, questions have been raised as to the power of the assistant or assistants carrying on the work of such elected officials, during the term of the leave of absence of such officer.

In one instance where the authority of the assistant so appointed to act, was questioned, both directly and collaterally, the elected official tendered a formal resignation to avoid the confusion resulting from the attacks made upon the acts of his assistant. By such resignation the County is put to the expense of a formal election to fill the vacancy created by such resignation, which situation would not have occurred but for the decision of the Illinois Supreme Court in this case.

5. That the work and duties of the County officials can and will be carried on without public inconvenience, by an assistant or assistants appointed and qualified to perform such work and duties; and in the event of the citizen elected to fill such County office terminating his service with the armed forces, he would return to fill out the remainder of the term for which he had been elected.

6. To hold that a citizen elected to an office under the authority of the State, by entering the armed forces, produces a vacancy in such elective office, operates to deprive the citizen of his right to have his status preserved as an elected official with the right to resume his duties upon his discharge from the armed forces.

7. That in no case has there been claim made by such inductee into the Army of the United States, to

collect or receive compensation during his leave of absence, but the compensation, fees and emoluments of the office have been paid to the assistant or assistants carrying on the work during the term of such leave of absence.

8. The decision of the Illinois Supreme Court is directly contrary to the decisions of the courts of other states, some of which are cited and set forth in the brief filed in support of said petition for *certiorari*.

9. It is respectfully urged that it was never the intent or purpose of Section 3, Article IV of the Illinois State Constitution (petition, page 3) to discourage such officials from rendering military service, to deter them from answering or to induce them to evade, such a call; because to do so would tend to impede the Federal Government in its efforts to mobilize its citizens and interfere with the efforts of the United States to meet the existing unprecedented major emergency. The primary object and purpose and proper construction of Section 3, Article IV of the Illinois State Constitution was to prohibit one person from holding two separate distinct incompatible offices, one under the state and the other under the United States. The acceptance of a commission in the United States armed forces is not the acceptance of an office of honor or profit incompatible with the holding of an office of honor or profit under the authority of the state.

Should this section of the Illinois State Constitution be interpreted as having application to the citizen holding office under authority of the state, retaining that office after accepting and while holding a commission in the armed forces of the United States, it would operate as an involuntary forfeiture by the citizen of his state office because of his answering the call to military service which it would be unlawful and unpatriotic for him to decline. Such a construction is a reflection both upon the intelligence and the patriotism of those responsible for the incorporation of this provision in the State Constitution.

10. A discussion of the distinction between accepting a commission in the Army of the United States in

the present emergency, and the acceptance of a commission in the Regular Army appears in Volume 22 of the Opinions of the Attorney General of the United States at page 88.

The Supreme Court of Texas in the case of *Cramer* v. *Sheppard*, 167 S. W. (2d) 147 is an authority additional to those cited in the brief filed in support of the petition for writ of *certiorari*, that the acceptance of a commission in the armed forces of the United States does not vacate a state office which the citizen so commissioned was holding under the state law.

It is obvious that this Nation is now engaged in the greatest war of its history, a struggle for its very existence. The interpretation of that section of the Illinois State Constitution as urged by the petitioner will result in giving to our armed forces, the services of men it might otherwise be more difficult to obtain. This interpretation will permit more to offer their services under circumstances holding that they can resume the duties of their civil offices when the war is over if his term of office has, as yet not expired.

We respectfully submit that such a construction is but logical and is in the best interests of both the United States and of the State of Illinois.

WE THEREFORE, RESPECTFULLY, urge that the petition for the writ of *certiorari* to the Supreme Court of the State of Illinois, heretofore filed in this cause be allowed and that this Honorable Court review and determine the judgment and decree in said cause so that said judgment of the Supreme Court of the State of Illinois may be reversed by this Court.

At a meeting of the Illinois State's Attorney's Association, held in the City of Springfield, Illinois, on February 19 and 20, 1943, it was unanimously authorized by the Association that the undersigned in their own behalf and in behalf of the Association, file and present this motion

for leave to appear and be heard *amicus curiae* in support of said petition and the prayer thereof.

Respectfully submitted,

GEORGE W. HOWARD, JR., *President,*
S. J. HOLDERMAN, *Secretary-Treasurer,*
LYLE WHEELER, *First Vice President,*
LEE E. DANIELS, *Second Vice President,*
WILLIAM M. CARROLL, *Third Vice President,*
Illinois State's Attorney's Association,

JOHN J. BRESEE,
HAROLD C. JONES,
WILLIAM T. HENDERSON,
Special State's Attorney's Association Committee,

THOMAS SWEENEY,
Member of Association Representing the Above.

Office - Supreme Court, U. S.
FILED
APR 28 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 746

EDWARD D. MARKHAM,

Petitioner,

vs.

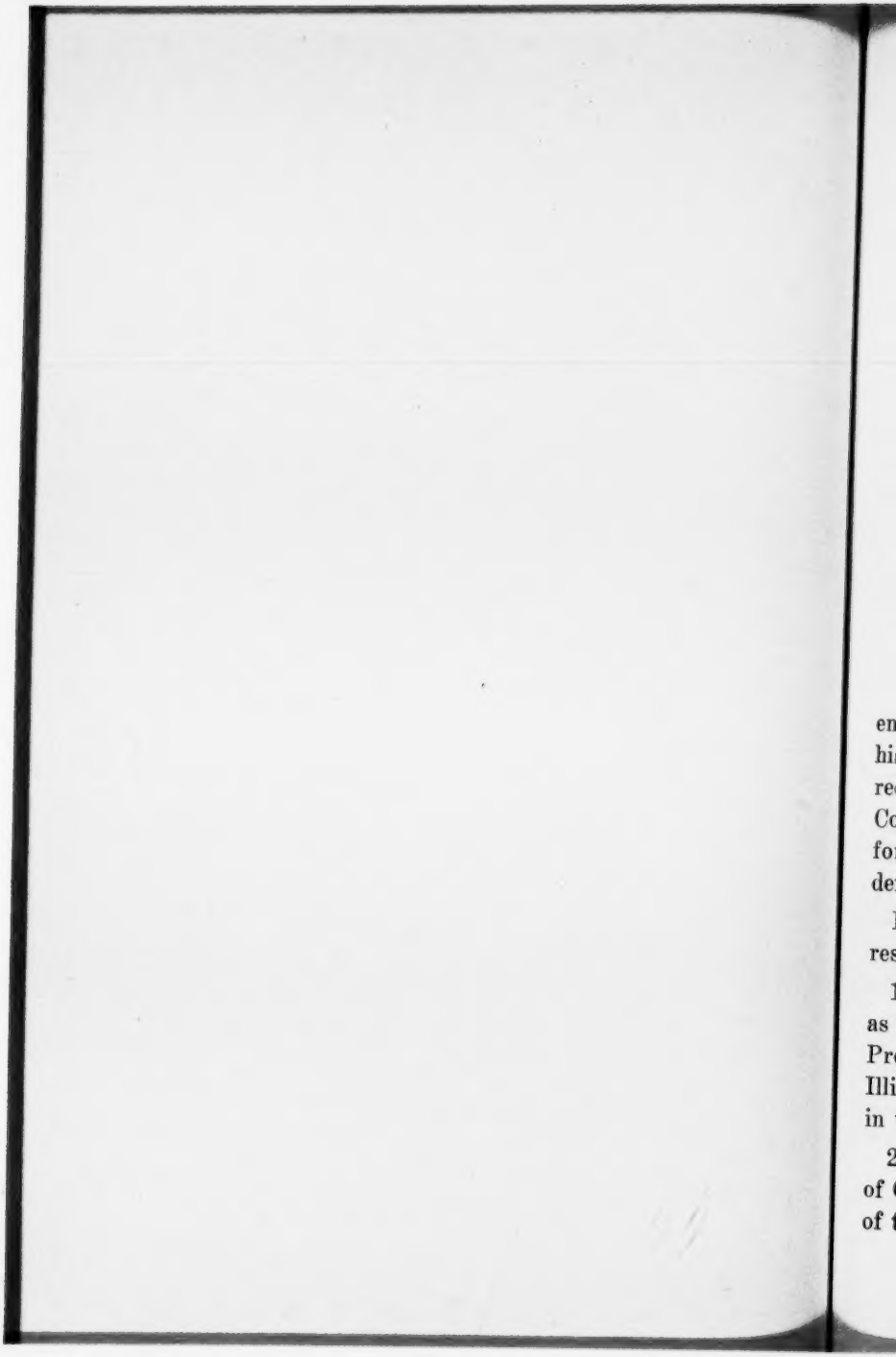
PEOPLE OF THE STATE OF ILLINOIS, EX REL. EARLE G. H. CROMER, ET AL.,

Respondents.

PETITION FOR REHEARING.

HENRY I. GREEN,
Urbana, Illinois,
CHARLES J. MONAHAN,
77 West Washington St.,
Chicago, Illinois.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 746.

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. EARLE G. H. CROMER, ET AL.,

Respondents.

PETITION FOR REHEARING.

Comes now Edward D. Markham, petitioner in the above entitled cause, by Henry I. Green and Charles J. Monahan, his attorneys, and respectfully prays a rehearing and a reconsideration of the ruling entered by this Honorable Court on April 5, 1943, whrein the prayer of this petitioner for writ of certiorari in the above entitled cause was denied.

In support of this petition for rehearing, your petitioner respectfully shows:

1. The Court overlooked the fact that there was filed as a part of the record in this cause, a certificate from the Presiding Justice of the Supreme Court of the State of Illinois that a federal question was presented and involved in this cause.

2. Appearing at page 1 of the record is the certificate of Clyde E. Stone, Presiding Justice of the Supreme Court of the State of Illinois, wherein is set forth the nature and

character of the federal question presented and involved. A copy of that certificate appears at pages 6 and 7 of the petition for certiorari.

3. The decision of the Supreme Court of Illinois is in direct conflict with the decisions of courts of last resort in a number of other states upon the same question and proposition, viz.: Whether or not the acceptance of a commission in the armed forces of the United States, operates *ipso facto* to create a vacancy in any public office held under authority of any state.

4. If there is no review and decision of this question by the Supreme Court of the United States, there will exist and remain directly conflicting rules in the several states upon the same federal question.

5. On page 18 of the petition for writ of certiorari, we cited, and now again call attention to the decisions of courts of last resort in the states of Missouri, California, Louisiana, Texas and Florida, which are in direct conflict with the decision of the Illinois Supreme Court in this case.

6. The question here involved is of tremendous public importance.

In the states named, other than Illinois, wherein the question was presented, the constitution of the state contained the same constitutional provision as exists in Illinois with respect to incompatible officers held under authority of the state and of the federal government. In all of the state court decisions above referred to, the question for consideration was raised on the following provision of the state constitution:

> "Nor shall any person holding any office of honor or profit under any foreign government or under the government of the United States hold any office of honor or profit under the authority of this State."

In each and all of the decisions of the state courts above

referred to, the same provision was contained in the constitution of the state where the question arose.

In all of said states other than Illinois, the court of last resort held that the holding of a commission in the armed forces of the United States was not "holding any office of honor or profit * * * under the government of the United States."

7. The court has, we believe, overlooked the fact that if the provision of a state constitution is intended or construed to be controlling with respect to the consequences of accepting a commission in the armed forces, then it violates the provisions of Article I, Section 8, of the Federal Constitution as pointed out on page 12 *et seq.* of our petition for certiorari.

8. This court must have overlooked the fact that by acts of Congress and acts of the state legislature of the State of Illinois, there has been adopted a common public policy to the effect that a citizen will not be penalized because he is a patriot.

We, therefore, respectfully pray that reconsideration be given to the petition for certiorari filed in this cause; that upon reconsideration, said petition be granted; and that after opportunity for filing of briefs and presenting arguments by counsel for petitioner, this Court will be persuaded to accept the reasoning of the courts of last resort of the states of Missouri, California, Louisiana, Texas and Florida as against the reasoning of the Supreme Court of Illinois in this case; and that the decision in this case by the Supreme Court of Illinois be reversed.

HENRY I. GREEN,
Urbana, Illinois,

CHARLES J. MONAHAN,
77 West Washington St.,
Chicago, Illinois.